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troversy has been settled by statute.¹⁴ Under such an enactment the New York Court of Appeals, in the recent case of *Clowe v. Seavey et al.* (1913) 102 N. E. 521, in passing upon the question for the first time,¹⁵ held that a devise to A and his descendants at a future time might be vested or contingent, but that in either case the remainder would pass to the trustee in bankruptcy, thus adopting the plain meaning of the statute. Where the gift was in the form of a mere direction to trustees to pay to the undesignated members of a class to be ascertained upon the happening of a future event, a contrary result was reached in several earlier federal cases, on the theory that the testator intended no present interest to pass to the remaindermen.¹⁶ Inasmuch as the effect of the will was to create a remainder, however, and since mere intention can never avoid positive rules of law, such an interest would seem alienable irrespective of the testator's intention. The New York court's position seems preferable, but in any event should be followed in subsequent federal cases, as the state courts' interpretation of a statute involving property rights is authoritative.¹⁷

MEASURE OF DAMAGES FOR RATE DISCRIMINATION BY CARRIERS.—A common carrier in the absence of statute is not bound to charge everyone equally for his services,¹ but he must refrain from unjust or unreasonable discrimination.² The question as to what constitutes such

¹⁴N. Y. Real Property Law § 40. "A future estate is either vested or contingent. It is vested when there is a person in being who would have an immediate right to the possession of the property on the determination of all the immediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain."

§ 59. "An expectant estate is descendable, devisable and alienable in the same manner as an estate in possession."

The above sections have been adopted practically word for word in the following states: California, Civ. Code, 1909, §§ 694, 695, 699; District of Columbia, Code of Law 1911, §§ 1022, 1030; Idaho, Rev. Code, §§ 3051, 3052, 3065; Michigan Comp. L. 1897, §§ 8795, 8817; Minn. Gen'l Stat. 1913, §§ 6663, 6685; North Dakota, Code, §§ 4729, 4730, 4734; South Dakota, Civ. Code, §§ 209, 210, 214; Wisconsin, Statutes 1898, §§ 2037, 2059.

In Iowa, Code § 48, Par. 8 "Real Estate includes land, tenements, and hereditaments, and all rights thereto and interests therein." In New Jersey, Comp. Stat. 1910, Conveyances § 19. "Transfers of estates of expectancy authorized." In Rhode Island, General Laws, 1909, c. 252, § 23 "Contingent and executory interests and a possibility coupled with an interest may be transferred by deed or will." In Virginia, Code § 2418, and West Virginia, Code § 3024. "Any interest in or claim to real estate may be disposed of by deed or will."

¹⁵The similar case of *National Park Bank v. Billings* (N. Y. 1911) 144 App. Div. 536, affirmed, 203 N. Y. 556 is not a clear authority where the gift is merely to a class, since there the members were individually named.

¹⁶*In re Hoadley* (D. C. 1900) 101 Fed. 233; *In re Wetmore* (D. C. 1900) 102 Fed. 290, affirmed (C. C. A. 1901) 108 Fed. 520; *In re Gardner* (C. C. 1901) 105 Fed. 670. And note that in *Ward v. Ward* (C. C. 1904) 131 Fed. 946, *contra*, the remaindermen were individually named.

¹⁷*In re Hoadley*, *supra*; see 10 Columbia Law Rev. 242.

¹⁴ Elliott, Railroads (2nd ed.) § 1467.

²This is a logical development of the rule that a carrier is limited to a reasonable compensation for his services, owing to their public nature. 2 Hutchinson, Carriers (3rd ed.) § 521.

discrimination has given rise to numerous conflicting views,³ but where it has been found to exist the injured shipper has generally recovered, in an action for money had and received, the amount paid in excess of the rate charged the favored shipper.⁴

In England⁵ and in some of the United States statutes have now been passed covering the question of rate discrimination. In 1887 Congress by the Interstate Commerce Act⁶ provided that charges should be the same for carriage under substantially similar conditions, and that any carrier doing any act prohibited by the act should "be liable to the person injured thereby for the full amount of damages sustained in consequence of any such violation * * *."

In the case of *Pennsylvania R. R. v. International Coal Mining Co.* (1913) 33 Sup. Ct. Rep. 893, it was decided by a divided court that in order to recover under this act, a shipper who had been charged a higher rate than another for a similar service could not recover the difference between the rates charged, but must prove actual damage in consequence of the discrimination. The opinion was based on the theory that the plaintiff, having been charged a reasonable rate, was not damaged by the mere fact that a lesser charge was required of another shipper, unless the discrimination had enabled the latter to undersell the plaintiff or had prevented the plaintiff from making a contemplated sale;⁷ and that to allow the difference in rates to be arbitrarily set as the measure of damages would be to enforce a penalty⁸ against the carrier; whereas by this section of the act compensation to the shipper was alone intended since section 10 provides for penalties.

A vigorous dissenting opinion was delivered by Mr. Justice Pitney, in which he points out that the effect of the majority opinion is seriously to impair the enforcement of equality in the treatment of shippers, which was the real purpose of the act; and since the courts have always exhibited a tendency to exclude evidence of remote damage, such as the damage insisted upon by the majority of the Court necessarily would be,⁹ it may well be said that by "damage" was meant

³Usually charges must be equal for carriage of the same class of goods under similar circumstances. *Samuels v. Louisville & N. R. R.* (C. C. 1887) 31 Fed. 57; *Borda v. Phila. & Reading R. R.* (1891) 141 Pa. 484; but see *Cowden v. Pac. Coast S. S. Co.* (1892) 94 Cal. 470. A discrimination due to the quantity shipped is proper under certain circumstances, *Concord & Portsmouth R. R. v. Forsaith* (1879) 59 N. H. 122; *Cleveland, Columbus etc. Ry. v. Closser* (1890) 126 Ind. 348, but may be carried to such an extent as to become illegal. *Hays v. Pennsylvania R. R.* (C. C. 1882) 12 Fed. 309; *Scofield v. Ry.* (1885) 43 Oh. St. 571. A discrimination tending to give advantages to the business of one or more shippers at the expense of others is unreasonable and unjust. See *Camblos v. Phila. & Reading R. R.* (Pa. 1873) 4 Brewst. 563.

⁴*Louisville, Evansville & St. Louis etc. R. R. v. Wilson* (1892) 132 Ind. 517; *Cook & Wheeler v. Chicago, R. I. & Pac. Ry.* (1890) 81 Ia. 551; *Kinsley v. Buffalo, N. Y. & P. R. R.* (C. C. 1888) 37 Fed. 181.

⁵8 & 9 Vict. ch. 20.

⁶24 Stat. 379, 382, §§ 2, 8.

⁷See *Ragan & Buffet v. Aiken* (Tenn. 1882) 9 Lea 609, 620; *cf. Hoover v. Pennsylvania R. R.* (1893) 156 Pa. 220, 244; *McDuffee v. R. R.* (1873) 52 N. H. 430.

⁸See *Parsons v. Chic. & Northwestern Ry.* (1897) 167 U. S. 447, 455.

⁹See *Union Pacific Ry. v. Goodridge* (1893) 149 U. S. 680.

the direct damage resulting from the payment of higher freight rates, which would be the difference between the higher and lower rates.¹⁰

On this point, however, the majority opinion seems to have employed the better reasoning, for in a case of discrimination by charging a lower rate than is lawfully required, it does not follow as a matter of law, that the shipper who pays the lawful and reasonable rate has been damaged to the extent of the benefit unlawfully conferred by the carrier upon the favored shipper; and consequently the difference between the rates charged cannot properly be made the measure of damages suffered. But in an action for money had and received, as distinguished from an action sounding in tort for damages, the injured shipper may recover the difference between the rates charged, on the theory of reparation for an unreasonable charge by the carrier, in violation of section 1 of the act.¹¹ It is immaterial that the complaining shipper was charged no more than the rate published as reasonable, for the carrier, having unlawfully conferred a benefit on one shipper, should not be heard to say that it would be unreasonable to compel him to deal on an equal basis with all those similarly situated.¹² In other words, the carrier has by his own unlawful act precluded himself from saying that the charge paid by the plaintiff was reasonable.¹³ The complaint in the principal case contained a count evidently based on this theory, and on this count the plaintiff might well have been allowed to recover the amount charged, measured by the difference in rates.

POWER OF MUNICIPALITY TO EXCEED DEBT LIMIT.—In the application of the constitutional and statutory limitations which have been placed on the powers of municipalities to contract debts, the courts are in hopeless conflict. It is of utmost importance to investors to under-

¹⁰The dissenting opinion also points out that if this view were adopted, a great number of practical difficulties would be obviated. To prove actual damage from the discrimination in favor of plaintiff's competitor compels both the court and the injured shipper to inquire into the "state of the market and ascertain whether upon the precise date that the goods of the injured party reached the market, goods of like character owned by the favored shipper came into direct competition with them." In many cases the injured shipper would undoubtedly rest content with the difference between the rates charged rather than undertake to establish that he had really suffered a greater amount of damage.

¹¹See *Poor Grain Co. v. Chic. B. & Q. Ry.* (1907) 12 Int. Com. Rep. 418. For a violation of § 4 of the act, prohibiting discrimination between long and short haul rates, the excess rate may also be recovered. *Junod v. Chicago & N. W. Ry.* (C. C. 1891) 47 Fed. 290.

¹²Even though the increased rate may have been borne ultimately by the purchaser of the goods and not by the shipper, the carrier, having unlawfully extorted it from the shipper, should not be permitted to retain it. See *Burgess v. Transcontinental Freight Bureau* (1908) 13 Int. Com. Rep. 668.

¹³See *Messenger v. Pennsylvania R. R.* (1873) 36 N. J. L. 407, 411. The English courts allow a recovery, in an action for money had and received, of the difference in rates, when there has been a discrimination in violation of § 90 of the Railway Clauses Consolidation Act, 8 & 9 Vict., ch. 20. *Great Western Ry. v. Sutton* (1869) L. R. 4 Eng. & Ir. App. 226. In considering this point in the principal case Mr. Justice Pitney in his dissenting opinion uses the term "estoppel."